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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1963

No. 593

EDWARD C. ST. CLAIR, Individually and in his own right as a person directly aggrieved and on behalf of all others similarly situated and on behalf of the PEOPLE OF THE STATE OF NEW YORK, as a citizen and taxpayer thereof. *Petitioner,*

against

YONKERS RACEWAY, INC., ROOSEVELT RACEWAY, INC., MID-STATE RACEWAY INC., SARATOGA HARNESS RACING ASSOCIATION, INC., BUFFALO TROTTING ASSOCIATION INC., GENESEE-MONROE RACING ASSOCIATION, INC., *Respondents,*

and

ROBERT A. GLASSER, SPENCER B. EDDY, JAMES A. FARLEY, as and constituting the STATE HARNESS RACING COMMISSION,

JOSEPH H. MURPHY, FREDERICK R. CLARK, IRA J. PALESTIN, as and constituting the STATE TAX COMMISSION,

ARTHUR LEVITT, as Comptroller of the State of New York, and

LOUIS J. LEFKOWITZ as Attorney General of the State of New York, *Defendants.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT ROOSEVELT RACEWAY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Petitioner, Edward C. St. Clair (hereafter called "St. Clair") invokes the jurisdiction of this Court pursuant to that part of 28 U. S. C. § 1257, subd. 3, which provides for review of final state court judgments by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * *." The fact, however, is that no constitutional question was argued to or decided by the New York Court of Appeals. Its judgment was based solely upon questions of state law.

Statement of Case

The statement of the case and the material facts in the petition are inaccurate in part.

The New York Pari-Mutuel Revenue Law has always provided that out of the total bets on any race, 15% is to be retained by the harness tracks and 85% is to be distributed to winning bettors (McK. Unconsol. Laws § 8019). Contrary to St. Clair's assertion, the retained 15% is *not* a tax on bettors. The New York Court of Appeals so held as far back as 1947 in *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 254, 72 N.E.2d 697, 698, cert. den. 332 U. S. 761. (See also, *Matter of Blaikie*, 11 A.D.2d 196, 203, 202 N.Y.S. 2d 659, 667). Therefore, neither St. Clair's money nor that of any bettor is taken from him by operation of the State's taxing power.

The retained 15% is a fee which the tracks charge for their services in conducting betting. The tracks are limited by statute to 15% as a maximum. Absent such limitation, the tracks could charge whatever they want. They have a right to decide who shall enjoy their facilities and the con-

ditions under which they shall be enjoyed (see *Madden* v. *Queens County Jockey Club*, *supra*).

From the retained 15%, the harness tracks pay a special pari-mutuel revenue tax "for the privilege of conducting pari-mutuel betting" (McK. Unconsol. Laws § 8019). This privilege tax was originally fixed at 5% of each dollar bet (N. Y. Laws 1940, ch. 254). Thereafter the law was amended and the tax increased—the rates were graduated from 5% to 11%, depending upon the amount wagered in a given night (N. Y. Laws 1949, ch. 341; N. Y. Laws 1954, ch. 513). Thus, upon wagers exceeding $600,000.00 (a nightly occurrence at the larger tracks), the tracks pay the maximum of 11 cents by way of taxes out of each 15 cents retained.

In 1956, after two years of hearings, the New York Legislature enacted § 45-a of the Pari-Mutuel Revenue Law (McK. Unconsol. Laws § 8020) (hereafter called "§ 45-a" or "section 45-a") making the findings, in subdivision 1 thereof, that inadequate plants had restricted admissions and bets with attendant loss of revenues to the State and that

> "* * * enlargement and modernization of plant and structures of such tracks in this state would result in increased admissions and larger sums being deposited in pari-mutuel pools and would, therefore redound to the financial benefit of the state and to the comfort, safety and convenience of its citizens."

Section 45-a had no impact whatever on bettors, for no change was made in the amount harness tracks could retain from bets. As before, it authorized the tracks to retain 15% of each dollar wagered. Section 45-a changed only the amount of tax payable out of the retained 15%, granting a limited tax reduction to each track which made capital improvements with the approval of the State Harness Racing Commission.

The reduced tax rates did not become applicable to a track immediately upon its completion of improvements.

The track continued to pay taxes each year at the same rates as before (5% to 11%) until that date in the year when, after adjusting for any difference in the number of racing nights, the total of its said tax payments equalled the amount it had paid to the State in 1955 (the year wherein the State's revenue from the pari-mutuel revenue tax on harness tracks reached their peak). After that date and for the remainder of the year, the track's tax rates were reduced by one-half, an amount equal to the other half being deposited by the track in a New York bank of its own choosing, in a special account in the track's name entitled "construction account" (subds. 4, 5). Moneys in its construction account were transferable at the end of each year to the track's general funds upon the occurrence of certain conditions (subd. 6). The reduced rates applied to each capital improvement track until its construction account moneys equalled the cost of its improvements. After that, it was taxable at the old rates.

Section 45-a also provided (subd. 9(a)), just as the Pari-Mutuel Revenue Law had always done (McK. Unconsol. Laws § 8019), that the tax is deemed levied when payment to the State Tax Commission is required to be made, and that moneys withheld from bets and not required to be paid to the State Tax Commission may be held by the track for its own use and purposes. Obviously, therefore, moneys not required to be paid to the State Tax Commission are not moneys belonging to the State. In further recognition of this fact, § 45-a provided that moneys in construction accounts "shall be held by the harness race track not as public moneys * * *" (subd. 8).

Various tracks in the State expended $42,638,858.40 on capital improvements pursuant to approval of the State Harness Racing Commission, of which over $19,000,000 was expended by Roosevelt Raceway, Inc. (hereafter called "Roosevelt") (fols. 37-8). As a consequence of the receipt of construction fund moneys to the extent permitted by § 45-a, only one track—Batavia (Genesee-Monroe Racing Association, Inc.)—continues to be entitled to the reduced

rates provided for by § 45-a. All other harness tracks now pay taxes at the pre-§ 45-a rates.

The annual reports of the State Harness Racing Commission show that the State of New York has received approximately $80,000,000.00 more in revenues from the harness tracks in existence in 1955 (principally from Roosevelt and Yonkers Raceway, Inc., the largest capital improvement tracks) than it would have received if its revenues had continued at the 1955 level. Moreover, the reports show that if attendance and betting continue at the same levels as 1962, the State's annual revenues in the future from harness tracks will be about $50,000,000.00 or double what they were in 1955 before the capital improvements.

Before the present action was commenced, one Blaikie, a citizen-taxpayer, requested permission from the New York Appellate Division, First Department, to file a taxpayer's suit seeking, among other things, an adjudication that construction account funds are moneys belonging to the State and that § 45-a is unconstitutional (*Matter of Blaikie, supra*, 11 A.D.2d 196, 202 N.Y.S.2d 659). Blaikie sought leave pursuant to Article V, § 1, of the New York State Constitution (McKinney Const. Art. V, § 1) which, as implemented by § 111, State Finance Law (McK. Consol. Laws), provides in relevant part that, with the permission of the Appellate Division, a taxpayer may sue to restrain unaudited payment of moneys belonging to the State or under its control. The Court denied permission to sue, holding, among other things, that construction account funds are not moneys belonging to the State or under its control (*Id.* at 201, 202 N.Y.S.2d at 666).

In the present action, commenced four years after the enactment of § 45-a, St. Clair obviously sought to circumvent the refusal of the Appellate Division to allow Blaikie to sue as a taxpayer.

St. Clair brought the present suit in three capacities: (i) as a bettor, (ii) on behalf of all other bettors, and (iii)

as a citizen and taxpayer on behalf of the people of the State of New York. He alleged four causes of action. In the first two, St. Clair asserted that he made several bets, totalling $10.00, at Roosevelt on August 27, 1960, winning some and losing one (fols. 27-8, 47-8, 49-50). In the third and fourth causes of action, he stated that he placed several bets, totalling $8.00, at Batavia on September 10, 1960, winning some and losing one (fols. 52-3, 60-1). He alleged that 15% of his bets, i.e., $2.70, was retained by said tracks, that out of this retained portion, an unknown amount was transferred to said tracks' construction accounts, and that said tracks intend to transfer this unknown sum along with other moneys in their construction accounts to their general funds to be used for their private purposes (fols. 28-30; 47, 49-51, 53-5; 59, 61-2).

He alleged that § 45-a and the retention of a portion of his moneys by said tracks for their private purposes was in violation of the Constitution of the State of New York and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (fols. 32-3). He further alleged that if the moneys retained by said tracks were not his moneys and that of others similarly situated, they were moneys of the State and the use thereof by the tracks and § 45-a was void and in violation of said constitutional provisions (fols. 40-1).

Pursuant to motion by the defendant harness tracks and supported by affidavit of the Attorney General, filed on behalf of himself and of the other public officers named in the complaint, the Supreme Court, Erie County dismissed St. Clair's complaint on the ground he lacked legal capacity to sue. The Appellate Division affirmed without opinion.

The Court of Appeals also affirmed, stating at the outset of its opinion: "The simple question presented on this appeal is whether the complaint was properly dismissed on the ground that appellant lacks legal capacity to sue" (13 N.Y.2d 72, 75, 192 N.E.2d 15). The Court of Appeals held that under the long-established law of the State of

New York, "an unaggrieved citizen-taxpayer, such as appellant, lacks standing to challenge a statute's constitutional validity" (Id. at 76, 192 N.E.2d at 16). Quoting from *Schieffelin* v. *Komfort*, 212 N. Y. 520, 530, 106 N. E. 675, 677, and from the opinion of Mr. Justice Black, in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 132, the Court found present efficacy in the rationale underlying the rule originally announced in *Doolittle* v. *Supervisors of Broome County*, 18 N. Y. 155, that taxpayers as such do not have standing in court to challenge the constitutionality of state legislation (Id. at 76, 192 N.E.2d at 16). The only issue argued by St. Clair in the Court of Appeals was his standing to sue.

Thereafter, St. Clair moved in the Court of Appeals for reargument, or for an amendment of that Court's remittitur to "make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not a federal question was necessarily decided" (St. Clair's Notice of Motion). In his brief (p. 5) in support of said motion, St. Clair asked that the remittitur be amended "to show that a federal constitutional question was passed upon by the Court." The Court of Appeals denied his motion in all respects.

ARGUMENT

No Question Arising Under The Constitution Of The United States Was Presented To Or Decided By The Court Of Appeals.

1. Without citation of a single supporting authority, St. Clair contends (1) that the decision of the New York Court of Appeals deprived him of his property without due process of law, and (2) that by refusing to enforce a provision of the New York Constitution prohibiting the gift of state moneys to private corporations (McKinney Const. Art. VII, § 8), the Court below has denied him equal protection of the laws.

These contentions, as will appear hereafter, are specious. More fundamental, however, is the fact that the

Court of Appeals did not decide any federal question, that its decision was based solely upon application of long-established state law, and that, therefore, this Court is without jurisdiction to entertain St. Clair's petition. The decisions of this Court make clear that its jurisdiction to review a state court judgment depends upon an affirmative showing "from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it." (*Lynch* v. *New York*, 293 U. S. 52, 54).

The question of the constitutionality of § 45-a was never reached below. St. Clair never asserted prior to the decision below that to deny him standing to challenge the constitutionality of § 45-a would deprive him of his property without due process of law or deny him equal protection of the laws.

When the opinion of the Court of Appeals is examined to ascertain whether a federal question was raised and decided, and whether the Court rested its decision on an independent state ground, it will be seen that the Court below did not even allude to a federal question. The only question argued to the Court of Appeals and decided by it was whether St. Clair had standing, which, we submit, is a question of state law (see *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278, 281). From the opinion below, it is thus abundantly clear that the Court's judgment was predicated on non-federal grounds and that the federal questions now specified were not decided (*Harding* v. *Illinois*, 196 U. S. 78, 88).

On St. Clair's motion to amend the Court of Appeals' remittitur, the only federal question St. Clair sought to have certified was one involving the due process clause of the Fourteenth Amendment (St. Clair's Brief, p. 12). He did not mention a question arising under the equal protection

clause. The Court of Appeals' refusal to amend its remittitur signifies the absence of a federal question in the case (cf. *Willner* v. *Committee on Character*, 373 U. S. 96, 104; *Rector* v. *City Deposit Bank*, 200 U. S. 405, 412).

2. St. Clair has failed to comply—because he cannot—with Rule 23, subd. 1(f), of this Court, requiring that his statement of the case specify "the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; * * *." The omission to comply with this rule is sufficient ground for the denial of his petition under Rule 23, subd. 4, of this Court.

3. On their merits, St. Clair's claims are specious.

The New York courts (e.g., *Matter of Guardian Life Ins. Co.* v. *Chapman*, 302 N.Y. 226, 238, 97 N.E.2d 877, 833; *Thompson* v. *Wallin*, 276 App. Div. 463, 466, 95 N.Y.S.2d 784, 788, affd. 301 N.Y. 476, 95 N.E.2d 806, dism. 342 U. S. 801), as well as this Court (e.g., *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278, 283) have often held that a party may attack the constitutionality of a statute only if it operates to his prejudice. The indisputable fact here is that § 45-a had no impact whatever on the individual rights of St. Clair and did not operate to his prejudice. Concededly, the Pari-Mutuel Revenue Law has always provided that out of each dollar wagered, the tracks shall retain 15 cents. Section 45-a did not alter this provision, so that if it were declared unconstitutional, St. Clair as a bettor would not receive one cent more or less. Since St. Clair could not benefit by an adjudication that § 45-a is invalid, he cannot question its constitutionality (see *People* v. *Griswold*, 213 N. Y. 92, 106 N. E. 929; *Matter of Northern Bank of New York*, 267 App. Div. 659, 48 N.Y.S.2d 65, lv. den. 293 N.Y. 936; *Matter of Thalmann*, 177 Misc. 1055, 1058, 32 N.Y.S.2d 695, 700).

Furthermore, for one to assert a violation of the due process clause of the Fourteenth Amendment, "it should appear that such person has a property in the particular thing of which he is alleged to have been deprived" (*New Orleans* v. *N. O. Water Works Co.*, 142 U. S. 79, 88). Once he placed a bet, St. Clair had no property right in the 15% thereof that the track retained (see *Madden* v. *Queens County Jockey Club*, *supra*). This Court, in *Consol. Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 599-600, stated:

> "The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averment of fact upon which the claim must depend that the question is one real and substantial and not so utterly without merit as to be frivolous. * * *."

Application by the Court below of New York's requirements as to standing hardly means that "the State of New York is sanctioning the expenditure of public funds for private endeavors" in violation of the State Constitution (Petition, pp. 13-4). In the first place, the only court which has specifically passed on the question has held that construction account funds are not public moneys (*Matter of Blaikie*, *supra*). In the second place, the use of the standing rule in this case would not prevent an accounting if the funds in question were public moneys (Petition, pp. 14-5). As noted, the State Constitution (McKinney Const. Art. V, § 1) provides that a taxpayer may sue to prevent the unaudited disbursement of public moneys if he first obtains permission from the Appellate Division. The people of the State thereby have granted taxpayers a method of protecting against the use of State funds for private purposes but have refused to grant them the unfettered right to institute such suits. Furthermore, the Attorney General, the Comptroller, the State Harness Racing Commission and the State Tax Commission could sue, if, in fact, public moneys were being given to the harness tracks.

4. It should be observed that all St. Clair claims is that a total of $2.70 of his money was withheld by two tracks and that an undetermined portion of this $2.70 was retained by said tracks in their construction accounts. This is *de minimis*. It clearly does not warrant the attention of this Court.

5. With respect to St. Clair's contention that he has been denied equal protection of the laws, it suffices to say that St. Clair nowhere alleges that any law of the State of New York is being applied in a different manner to similar groups (see *Ellis* v. *Dixon*, 349 U. S. 458, 460). The standing requirements are applied to all citizens and taxpayers alike.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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